Yakinline Marketing Sdn Bhd v Mayban Securities Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–2768 OF 2010
ABDUL WAHAB PATAIL, AZIAH ALI AND MOHAMAD ARIFF JJCA
30 APRIL 2013

Companies and Corporations — Shares — Sale of shares — Earnest deposit — Refund of — Appeal against — Conditions precedent for parties to fulfil within stipulated date — Whether not fulfilled — Whether defendant had right to terminate agreement and forfeit earnest deposit — Judicial appreciation of evidence — Whether trial judge had not sufficiently judicially appreciated entirety of share sale agreement — Whether warranted appellate intervention

Contract — Contingent contract — Non-fulfillment of conditions precedent — Whether rendering agreement void — Whether deposit given consequently had to be refunded — Contracts Act 1950 s 33(b)

In this appeal, the plaintiff's/appellant's claim in the High Court was for a refund of the sum of RM4m paid to the defendant/respondent as earnest deposit under a sale and purchase agreement of shares. The High Court not only dismissed the claim for the refund of the deposit but also dismissed the defendant's counterclaim for a declaration that it was entitled not to refund the deposit consistent with the provisions of cll 9.6 and 9.7 of the said share sale agreement. The dispute between the plaintiff and the defendant turned on cl 4 of the share sale agreement in relation to conditions precedent to be fulfilled by both parties. The conditions precedent, inter alia, requires the purchaser to obtain the approvals of the relevant authorities while the defendant was to secure a letter of instruction from Align Matrix as well as obtain the resolution of the Board of Align Matrix. The failure to fulfil the above conditions precedent was the very subject matter of the dispute. The agreement further included a 'Stop Date', and provided in cl 4.2 that if any of the conditions precedent set out in cl 4.1 was not fulfilled by the Stop Date, 'either party may rescind this agreement forthwith by written notice to the other party and the provisions of clause 4.9 shall apply.' The appellant contended that they could not satisfy the conditions precedent because without a letter of instruction from Align Matrix addressed to the respondent on the quantity of the sale shares, they were not in a position to secure the approvals from the relevant authorities. The respondent however, contended that until and unless the appellant secured the approvals from the relevant authorities, the respondent was not obliged to secure the letter of instruction from Align Matrix. The issues considered in this appeal was whether there was a serious failure of judicial

appreciation of the evidence, in particular the effect of the interlocking provisions in cl 4 of the share sale agreement on the main conditions precedent to be fulfilled by both parties such as to warrant appellate intervention.

Held, allowing the appeal with costs of RM10,000:

(1) It was clearly not possible to view any of the respondent's letters as a notice to terminate as required under the agreement. It was clearly a requirement that notice must be given by the vendor to the purchaser of a breach by providing a 14 days' notice to remedy the relevant default or breach, and it was only upon a failure to remedy the breach thereafter that the agreement was to be terminated forthwith without any requirement for the vendor to give any further notice: see cl 9.6 of the share sale agreement (see para 23).

(2) In the cross-examination, DW1, when prodded to provide the letter or resolution from Align Matrix as required, merely responded 'I don't have'. This, provided a very insecure foundation to establish liability on the part of the appellant that would enable the respondent to forfeit the rather large sum of RM4m earnest deposit (see para 24).

(3) The learned judicial commissioner had not sufficiently judicially appreciated the entirety of the share sale agreement, and in particular the entirety of cl 4.1 which placed obligations on both parties, such that the learned judicial commissioner's conclusion that there was a deliberate attempt on the part of the appellant as purchaser to rescind the agreement unlawfully could not be sustained (see para 25).

(4) The facts of this case showed the existence of a contingent contract within the meaning of the Contracts Act 1950 wherein both parties to the contract had obligations to perform. The provisions relating to conditions precedent to be fulfilled within a given date had to be construed strictly. If the conditions precedent or any of them could not be performed by the stipulated date, and no extension was given pursuant to the contract if so provided, the contract becomes void. Any deposit given consequently had to be refunded. Where the agreement provided for a clear 'Stop Date', it could be definitely ascertained whether or not the conditions precedent could be fulfilled by this date as set out in the agreement (see paras 27–28).

[Bahasa Malaysia summary

Dalam rayuan ini, tuntutan plaintif/perayu di Mahkamah Tinggi adalah bagi pemulangan bayaran berjumlah RM4 juta yang dibayar kepada defendan/responden sebagai deposit cengkeram di bawah perjanjian jual beli syer. Mahkamah Tinggi bukan sahaja menolak tuntutan pemulangan bayaran deposit tersebut tetapi juga menolak tuntutan balas defendan bagi satu deklarasi bahawa ia berhak untuk tidak memulangkan semula selaras dengan

peruntukan-peruntukan klausa 9.6 dan 9.7 perjanjian jualan syer tersebut. Pertikaian antara plaintif dan defendan membangkitkan klausa 4 perjanjian jualan syer bagi syarat-syarat terdahulu yang perlu dipenuhi oleh kedua-dua belah pihak. Syarat-syarat terdahulu tersebut, antara lain, memerlukan pembeli untuk mendapatkan kebenaran daripada pihak-pihak berkuasa yang relevan manakala defendan pula perlu mendapatkan surat arahan daripada Align Matrix dan juga mendapatkan resolusi lembaga Align Matrix. Kegagalan untuk memenuhi syarat-syarat terdahulu tersebut menjadi hal perkara pertikaian. Perjanjian tersebut selanjutnya memasukkan 'tarikh berhenti' dan memperuntukkan di bawah klausa 4.2 bahawa jika mana-mana syarat-syarat terdahulu yang dinyatakan dalam klausa 4.1 tidak dipenuhi pada tarikh berhenti, 'either party may rescind this agreement forthwith by written notice to the other party and the provisions of clause 4.9 shall apply.' Perayu menghujahkan bahawa mereka tidak boleh memenuhi syarat-syarat terdahulu kerana tanpa surat arahan daripada Align Matrix kepada responden mengenai kuantiti dalam syer jualan, mereka bukan dalam kedudukan untuk mendapatkan kebenaran daripada pihak-pihak berkuasa yang relevan. Responden walau bagaimanapun, menghujahkan bahawa sehingga dan melainkan perayu mendapatkan kebenaran daripada pihak-pihak berkuasa yang relevan, responden tidak berkewajipan untuk mendapatkan surat arahan daripada Align Matrix. Isu-isu yang dipertimbangkan dalam rayuan ini adalah sama ada terdapat kegagalan serius pertimbangan kehakiman ke atas keterangan, khususnya kesan peruntukan yang saling bersangkut paut dalam klausa 4 perjanjian jualan saham berkenaan syarat-syarat terdahulu utama yang perlu dipenuhi oleh kedua-dua pihak untuk mewajarkan campur tangan mahkamah rayuan.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM10,000:

(1) Adalah jelas tidak mungkin untuk melihat surat-surat responden sebagai notis penamatan yang dikehendaki di bawah perjanjian. Adalah jelas suatu keperluan bahawa notis mestilah diberikan oleh penjual kepada pembeli yang mungkir dengan memberikan notis 14 hari untuk meremedikan kemungkiran atau pelanggaran yang relevan, dan hanya dengan kegagalan untuk meremedikan pelanggaran tersebut barulah perjanjian akan ditamatkan tanpa apa-apa keperluan untuk penjual memberi notis lanjutan: lihat klausa 9.6 perjanjian jualan syer (lihat perenggan 23).

(2) Dalam pemeriksaan balas, DW1, apabila diminta mengemukakan surat resolusi daripada Align Matrix seperti yang dikehendaki, hanya membalas 'I don't have'. Ini, memperuntukkan asas yang tidak tetap untuk mewujudkan liabiliti di pihak perayu yang membolehkan responden untuk merampas jumlah yang agak besar iaitu pendahuluan cengkeram RM4 juta (lihat perenggan 24).

(3) Pesuruhjaya kehakiman telah tidak mempertimbangkan secara kehakiman keseluruhan perjanjian jualan syer dengan secukupnya, dan khasnya keseluruhan klausa 4.1 yang meletakkan tanggungjawab ke atas kedua-dua pihak, hinggakan kesimpulan pesuruhjaya kehakiman bahawa terdapat percubaan sengaja oleh perayu sebagai pembeli untuk membatalkan perjanjian tersebut secara tidak sah tidak boleh dikekalkan (lihat perenggan 25).

(4) Fakta kes ini menunjukkan kewujudan kontrak jangkaan dalam erti Akta Kontrak 1950 yang mana kedua-dua pihak kepada kontrak tersebut mempunyai tanggungjawab untuk melaksanakan. Peruntukan-peruntukan berhubung syarat-syarat terdahulu yang perlu dipenuhi dalam tempoh tarikh yang diberikan perlu ditafsirkan dengan ketat. Jika syarat-syarat terdahulu atau mana-mana daripadanya tidak boleh dilaksanakan pada tarikh yang ditetapkan, dan tiada lanjutan diberikan di bawah kontrak jika diperuntukkan sedemikian, kontrak menjadi batal. Mana-mana deposit yang diberikan akibatnya terpaksa dipulangkan. Jika perjanjian memperuntukkan 'tarikh berhenti' yang jelas, ia boleh ditentukan sama ada atau tidak syarat-syarat terdahulu boleh dipenuhi pada tarikh ini seperti yang dinyatakan dalam perjanjian tersebut (lihat perenggan 27–28).]

Notes

For a case on non-fulfillment of condititions precedent, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 3802.

For cases on sale of shares, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 994–1014.

Cases referred to

Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd [2003] 3 MLJ 152, CA (refd)

National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211, FC (refd)

Legislation referred to

Contracts Act 1950 s 33(b)

Appeal from: Civil Suit No D2–22–766 of 2006 (High Court, Kuala Lumpur)

Ramesh K Supramaniam (George Varughese) for the appellant.
Sunther Thulasi (Nurashikin bt Mansoor with him) (Affendi Zahari) for the respondent.

Mohamad Ariff JCA:

[1] This was an appeal from the High Court in a writ action in a very short

trial, where one witness each was called by the parties. The plaintiff's/appellant's claim in the High Court was for a refund of the sum of RM4m paid to the defendant as earnest deposit under a sale and purchase agreement of shares entered into between the plaintiff and the defendant dated 11 March 2005. The High Court dismissed the claim for the refund of the deposit. The learned judicial commissioner in the High Court also dismissed the defendant's counterclaim, in which the defendant had prayed for a declaration that it was entitled not to refund the deposit of RM4m consistent with the provisions of cll 9.6–9.7 of the earlier stated share sale agreement.

[2] It bears emphasis that the defendant's counterclaim included, inter alia, the following declarations:

> (a) Suatu deklarasi/perisytiharan bahawa perjanjian jualan syer bertarikh 11.3.2005 tersebut telah ditamatkan akibat daripada kegagalan Plaintif meremedikan keingkaran dalam tempoh 14 hari dari surat Defendan bertarikh 19.12.2005 seperti yang tersirat dalam Klausa 9.6 Perjanjian Jualan Syer;
>
> (b) Suatu deklarasi/pengisytiharan bahawa akibat dari keingkaran Plaintif tersebut, maka Defendan berhak untuk tidak memulangkan wang deposit sebanyak RM4,000,000.00 tersebut selaras dengan Klausa-Klausa 9.6 dan 9.7 Perjanjian Jualan Syer tersebut atau sebarang amaun lain.

[3] We allowed the appeal by a unanimous decision with costs here and below fixed by agreement of the parties at RM10,000. The deposit for the appeal was ordered to be refunded to the plaintiff/appellant. We ordered judgment to be entered as pleaded in the plaintiff's statement of claim.

[4] With the finding of the High Court in the plaintiff's favour by dismissing the counterclaim, we found an anomaly between the dismissal of the claim for the refund of the deposit and the dismissal of the counterclaim, since both related to the same subject matter, namely the refund of the earnest deposit. Upon a perusal of the grounds of judgment of the learned judicial commissioner and the appeal record, we found a lack of proper judicial appreciation of the evidence, particularly with reference to the several interlocking provisions under the share sale agreement.

[5] The relevant share sale agreement above mentioned was, on the facts, connected with a larger scenario. The sale shares were shares of a company called Liqua Corporation which were, inter alia, pledged with the defendant with reference to certain share trading accounts of another company called Align Matrix Sdn Bhd ('Align Matrix') and several accounts held by individuals to cover for trading losses. The sale shares totalled 75 million shares, which in

turn comprised pledged shares (42,900,000 shares pledged by Align Matrix), with the remainder being the shares in the individual accounts to cover for the trading losses.

[6] Align Matrix had earlier entered into a settlement agreement with the defendant dated 3 December 2004 by which Align Matrix had agreed to pay the defendant RM51m in settlement of its trading losses. As the legal and beneficial owner of the abovesaid 42,900,000 ordinary shares in Liqua Corporation, Align Matrix had agreed to transfer the Liqua shares into the defendant's pledged securities account. Align Matrix had provided an undertaking to the defendant not to sell or deal with the said Liqua shares without the defendant's prior consent, except where such dealing or sale was in accordance with the settlement agreement.

[7] These were the very same shares which were the subject matter of the share sale agreement between the plaintiff and the defendant, with the plaintiff as purchaser and the defendant as vendor. The total purchase consideration of the sale shares was RM52,500,000, but the agreement provided for a reduction in the purchase consideration in the event that the number of sale shares is reduced 'as stated in clause 2.2' of the share sale agreement.

[8] Clause 2.2, headed 'Variation of Sale Shares', reads:

> In the event any of the individuals or AMSB [Align Matrix] settles their outstanding trading losses with the Vendor and redeems the relevant number of trading shares before completion, the parties agree that the number of sale shares would be reduced by the number of Sale Shares redeemed by the individuals and/or TMSB provided the number of sale shares shall not be less than 42,900,000.

[9] The dispute between the plaintiff and the defendant turned on cl 4 of the share sale agreement in relation to conditions precedent to be fulfilled by both parties. The agreement further included a 'Stop Date', and provided in cl 4.2 that if any of the conditions precedent 'set out in Clause 4.1' was not fulfilled by the stop date, 'either party may rescind this Agreement forthwith by written notice to the other party and the provisions of Clause 4.9 shall apply'. The 'Stop Date' was defined under cl 1.1 of the share sale agreement as 'nine (9) calendar months from the date of this Agreement or such extended date as may be mutually agreed'.

[10] Clause 4.9 spoke of 'Effect of Rescission', stating:

> Upon the rescission of this Agreement in accordance with this Clause 4 the Vendor shall refund the earnest deposit paid by the Purchaser without interest and thereafter, this Agreement shall cease to have any effect and shall become null and void and neither of the parties shall have any further claims against the other save and except for any antecedent breach.

[11] We noted that cl 4.2 mentioned above expressly referred to any of the conditions precedent set out in cl 4.1 being not fulfilled by the stop date by 'either party'. What was implied was either the appellant or the respondent, as the respective purchaser and vendor of the sale shares, could by written notice rescind the agreement in the event any of the conditions precedent was not fulfilled by the opposing party.

[12] The failure to fulfil the conditions precedent was the very subject matter of the dispute. The dispute centred therefore on the meaning and effect to be assigned to the interlocking clauses of cl 4.1, headed 'Main Conditions Precedent'.

[13] Clause 4.1 contained four 'Main Conditions Precedent'. Conditions precedent (a)–(c) were to be satisfied by the purchaser (the appellant) whereas condition precedent (d) was to be satisfied by the vendor (the respondent).

[14] Under condition precedent (a), headed 'Resolutions', the purchaser was to obtain the resolution of the board of the purchaser approving the transactions and the resolution of the purchaser passed at a general meeting approving the transactions. Under condition precedent (b), the purchaser was to obtain 'the approvals of the following public authorities … for the transaction contemplated … including without limitation …' the approvals of 'Bursa Securities', FIC and if required, the approval of any other public authority. Condition precedent (c) headed 'Purchaser's Letter', required the purchaser to forward a letter addressed to the vendor stating that they would 'endeavour to ensure that AMSB will not settle their respective trading losses with the Vendor … prior to completion'.

[15] Condition precedent (d) was specifically addressed to the vendor and it referred to 'Letter of Instruction from AMSB'. It read:

> The Vendor having received the following from AMSB:
>
> (i) Letter of instruction authorising MSSB to apply any or all proceeds from the sale of the pledged shares to pay off losses incurred in relation to trading losses incurred by the individuals; and
>
> (ii) Resolution of the Board of AMSB authorising the matters referred to in Clause 4.1 (d) (i) above.

[16] Under the agreement therefore, the respondent had to secure a letter of instruction from Align Matrix as well as the resolution of the Board of Align Matrix in relation to the matters specified in condition precedent (d) as stated above.

[17] The appellant, as purchaser, satisfied conditions precedent (a) and (c) within three days of the share sale agreement being executed, but did not fulfil condition precedent (b). The respondent, as vendor, had not fulfilled condition precedent (d). Evidentially, these were not matters in dispute.

[18] It was the appellant's case that they could not satisfy the condition precedent (b) without having the letter of instruction from Align Matrix addressed to the respondent, since until that was done the quantity of the sale shares could not be determined, and if the quantity could not be determined, the appellant would not have been in a position to secure the approvals from the relevant authorities. The respondent's case was couched in the reverse. According to the respondent, until and unless the appellant secured the approvals from the relevant authorities, the respondent was not obliged to secure the letter of instruction from Align Matrix.

[19] The learned judicial commissioner was persuaded by the respondent's submission. She referred to an enquiry made by letter from respondent's/defendant's solicitors to the appellant in relation to this status of the approval of the public authorities. This letter was dated 24 June 2005. There was no immediate response to this enquiry. Instead of responding expeditiously to this enquiry, the appellant had written a letter through its solicitors on 12 December 2005 which was after the 'Stop Date', ie 10 December 2005. The respondent's solicitor's letter of 24 June 2005 was a simple letter of enquiry which read:

> *Share Sale Agreement between Mayban Securities Sdn Bhd and Yakinline Marketing Sdn Bhd dated 11th March 2005*
>
> We refer to the above and to the letter from your previous solicitors, Messrs Ram Yogan dated 8th June 2005, a copy of which is enclosed for your ease of reference.
>
> As Messrs Ram Yogan no longer represents you, we have been instructed by our clients, Maybank Securities Sdn Bhd to enquire on the following:
>
> (a) if you have appointed another firm of solicitors to act on your behalf in regard to the performance of your obligations under the above-mentioned Share Sale Agreement; and
>
> (b) whether you have obtained the necessary regulatory approvals from, among other parties, the Foreign Investment Committee ('FIC') in regard to the transfer of the 75 million ordinary shares of RM0.50 each in Liqua Health Corporation Berhad ('Sale Shares').
>
> We would be grateful if you could revert to this as soon as possible so we may advise our clients accordingly …

[20] The appellant's letter of 12 December 2005, alluded to above, referred

to cl 4.2 of the agreement and the clause stating that if any of the conditions precedent was not fulfilled by the stop date, either party may by written notice rescind the agreement, whereupon cl 4.9 was to apply. Under cl 4.9, the earnest deposit was to be refunded (free from interest) to the purchaser. This letter ended by stating:

> In view of the above we now write to state that since the Condition Precedent as stipulated in Clause 4 of the Agreement was not fulfilled by 10th December 2005 (Stop Date), our instructions are that the earnest deposit is to be refunded to us within 3 days from the date hereof.
>
> We hereby confirm that in you complying with our request contained herein we shall not have any claims against you whatsoever …

[21] The evidence disclosed that the appellant through its solicitors, wrote another letter dated 4 January 2006 to the respondent denying that the appellant was in breach of the agreement. This was in response to the letter dated 19 December 2005 from the respondent which argued that the appellant had unilaterally rescinded the share sale agreement 'in light of your failure to respond to our notice under paragraph 3 (b)', and in view of that failure there was an alleged breach of cl 9.6 of the share sale agreement.

[22] The learned judicial commissioner formed the view that the failure on the part of the appellant to deny receiving the earlier letter from the respondent's solicitor of 24 June 2005, and their mere denial that the letter constituted a notice to terminate, 'was a deliberate attempt on the plaintiff to rescind the Agreement as they had waited until the Stop Date to issue the letter'. This conclusion was made with reference to the plaintiff's solicitor's letter dated 4 January 2006. The learned judicial commissioner also referred to the cross-examination of PW1 and found that the plaintiff had not informed the defendant solicitors of the non-compliance of cl 4.1(d). This finding of the learned judicial commissioner can be found in para 1 on p 13 of the grounds of judgment.

[23] Upon considering the totality of the grounds of judgment and the evidence as disclosed in the appeal record, we were of the view that there was a serious failure of judicial appreciation of the evidence, in particular the effect of the interlocking provisions in cl 4 of the share sale agreement on the main conditions precedent to be fulfilled by both parties, as earlier stated, such as to warrant appellate intervention. In particular, we found that it was clearly not possible to view any of the respondent's letters as a notice to terminate as required under the agreement. It was clearly a requirement that notice must be given by the vendor to the purchaser of a breach by providing a 14 days' notice to remedy the relevant default or breach, and it was only upon a failure to remedy the breach thereafter that the agreement was to be terminated

forthwith without any requirement for the vendor to give any further notice. See cl 9.6 of the share sale agreement. Under cl 9.7, it was clearly provided:

> In the event the Agreement is terminated pursuant to Clause 9.6 above, the parties hereby agree that:
>
> (ii) Any amounts paid to the Vendor as part of the purchase consideration shall not be refunded; and
>
> (iii) Any Sale Shares transferred by the Vendor to the Purchaser in consideration of the payment of the amount in 9.7 (i) above, will not be refunded to the Vendor.

[24] We also found on the evidence no clear proof that the respondent itself had obtained the letter of instruction from Align Matrix under cl 4.1(d), which was also one of the main conditions precedent to be satisfied. We noted on p 116 of the appeal record, Vol 2 (Part B), which comprised the notes of proceeding, it was put to DW1 in cross-examination that the number of shares sold must be confirmed before the plaintiff could obtain the approval from the FIC. First, the witness did not agree with the put question. Further, when it was put to this witness that the defendant had failed to fulfil its obligation under cl 4.1(d), he disagreed, but when prodded further to provide the letter or resolution from Align Matrix as required, he merely responded 'I don't have'. This, with respect, provided a very insecure foundation to establish liability on the part of the appellant that would enable the respondent to forfeit the rather large sum of RM4m earnest deposit.

[25] It is clear law that a commercial contract has be read as a whole and in light of the commercial context. In this regard we found that the learned judicial commissioner had not sufficiently judicially appreciated the entirety of the share sale agreement, and in particular the entirety of cl 4.1 which placed obligations on both parties, such that the learned judicial commissioner's conclusion that there was a deliberate attempt on the part of the appellant as purchaser to rescind the agreement unlawfully could not be sustained.

[26] Section 33(b) of the Contracts Act 1950 would apply on the facts of this case, since two important conditions precedent had not been fulfilled by the stop date, thus rendering the share sale agreement void:

> 33 Enforcement of contracts contingent on an event happening.
>
> (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> (b) If the event becomes impossible, such contracts become void.

[27] The facts of this case show the existence of a contingent contract within the meaning of the Contracts Act 1950 wherein both parties to the contract had obligations to perform. Provisions relating to conditions precedent to be fulfilled within a given date have to be construed strictly. If the conditions precedent or any of them cannot be performed by the stipulated date, and no extension is given pursuant to the contract if so provided, the contract becomes void. Any deposit given consequently has to be refunded. The decision of this court in *Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd* [2003] 3 MLJ 152 and that of the Federal Court in *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 was cited before us, being cases relevant to the obtaining of FIC approvals. In both cases the requirement to obtain an FIC approval for the sale of property was regarded as a condition precedent and therefore a contingent condition in the agreement. The Federal Court in *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd*, was particularly succinct on this, and in considering the effect of a failure to satisfy a condition precedent, said:

> Until the FIC approval was given liability for further performance remained unenforceable, ie suspended although neither the respondents nor the appellants could resile from it until it could be definitely ascertained that the condition could not be fulfilled.

[28] Where the agreement provides for a clear 'Stop Date', it could be definitely ascertained whether or not the conditions precedent could be fulfilled by this date as set out in the agreement.

[29] In these circumstances, we allowed the appellant's appeal by a unanimous decision, with costs here and below fixed by agreement at RM10,000. The judgment of the High Court was set aside. The deposit for the appeal was ordered to be refunded to the plaintiff/appellant. Judgment was ordered to be entered as pleaded in the plaintiff's statement of claim.

Appeal allowed with costs of RM10,000.

Reported by Ashgar Ali Ali Mohamed